REMARKS/ARGUMENTS

The allowance of the claims has been withdrawn due to the submission of a new reference by Applicants, specifically Tetra Werke DE 3,006,158 ("Tetra Werke"). Applicants note with thanks and appreciation the indication of allowable subject matter in claims 30, 48, and 54-59. Reconsideration and continued examination of this application as amended is respectfully requested. Claims 1, 4, 6, 7, 17, 18, 20-30, 32, 33, 35, 36, 38-41, 46, 47, 49-51, 53-55, 57-58 and 60-66 are pending in this application.

1. Status of the Claims

Claims 30, 48 and 54-59 have been rewritten as or depend from new claims 61-66. Consequently, claims 61-66 are allowable, as are claims 30, 57 and 58 which depend from newly amended claims. Claims 1, 4, 6, 7, 17, 18, 20-30, 32, 33, 35, 36, 38-41, 46, 47, 49-51, 53-55, 57-58 and 60-66 are now pending in this application. Claim 3 was canceled and claim 1 was amended to include the limitations of claim 3. Claim 17 was amended to recite that the oat groats are whole oat groats. Claim 17 was also amended to correct an informality as "grit" was changed to "grits." Claims 48, 56 and 59 were canceled and rewritten in independent form as claims 62, 64 and 66, respectively.

2. 35 U.S.C. § 102 Rejections

Claims 1, 4, 6 and 7 are rejected under 35 U.S.C. 102(b) as being anticipated by Tetra Werke. Applicants have amended claim 1 to recite an uncooked food product consisting of uncooked whole oat groats, uncooked corn grits and mixtures thereof.

Tetra Werke does not teach or suggest an uncooked food product consisting essentially of a food selected from the group consisting of uncooked whole oat groats, uncooked corn grits and mixtures thereof as required in claim 1. Conversely, Tetra only teaches oats which are fractured to split the kernels into "two, three or possibly even four parts in such a way that the storage organ or starch body (endosperm) of the oat seed is exposed." *See* p. 1 of Tetra Werke. Thereafter, the

fractured oat groats are treated with a vitamin solution for 15 hours and dried. Thus, claim 1 is neither anticipated by nor rendered obvious in view of Tetra Werke because Tetra Werke merely teaches absorbing a vitamin solution into fractured oat groats and does not teach or suggest a whole oat groat having an added material absorbed into the food.

Moreover, Tetra Werke's disclosure of only using absorbing vitamins into only fractured oat groats clearly teaches away from the use of whole oat groats in claim 1. Teaching away is a *per se* demonstration of a lack of prima facie obviousness. *In re Dow Chemical,* 837 F.2d 469 (Fed. Cir. 1988). A reference may be said to teach away when a person of ordinary skill, upon reading the reference, would be led in a direction divergent from the path that was taken by the applicant. *Tec Air, Inc., v. Denso Mfg. Mich. Inc.,* 192 F.3d 1353, 1360 (Fed. Cir. 1999). One skilled in the art certainly would not be led to use whole groats from the disclosure of Tetra because Tetra Werke exclusively discusses fracturing the grains. Accordingly, claim 1 is further nonobvious over Tetra Werke.

Even further, the Examiner contends that no criticality is seen in the use of whole groats as the specification discloses both whole and cut groats and further that if one did not want increased absorbability, it would have been obvious to use whole oats. The mere disclosure of both the use of whole and cut groats in the present invention does not mean that the whole form of the oat lacks invention or is taught or suggested by the prior art. To so find would amount to the impermissible use of hindsight. Secondly, Applicants submit that the Examiner is trying to fill in the deficiencies of the prior art by mere reference to what would have been obvious to one skilled in the art without any support. That is improper. As discussed above, Tetra Werke has no teaching or disclosure whatsoever of absorbing a vitamin solution into anything other than a fractured oat and clearly teaches away from the claimed invention. Thus, the Examiner's position appears to stem from the Examiner's own judgment as to what would be basic knowledge in the art. This is an improper basis for a rejection as "[t]he deficiencies in the prior art cannot be remedied by the Board's general conclusions about what is 'basic knowledge' or 'common sense' to one of ordinary skill in the art". In re Zurko, 258 F.3d 1379, 1385 (Fed. Cir. 2001). In view of the foregoing, amended claim 1, and all claims

dependent thereon as well as claims 17, 18, 20-30, 32, 33, 50-51, 53, 54 are patentable over Tetra Werke.

3. 35 U.S.C. § 103 Rejections

Claims 3, 17, 18, 20-25, 27-29, 32, 33, 35-49, 50-53, and 60 are rejected under 35 U.S.C. § 103(a) as being obvious over Tetra Werke. Claims 3, 17, 18, 20-30, 32, 33, 50-51, 53 and 54 are patentable for the reasons set forth above as these claims are directed to processing whole oat groats.

In addition, as to claim 35 and those claims dependent therefrom (claims 36, 38-41, 46-47, 49 and 60), Tetra Werke does not teach or suggest whatsoever contacting the surface of an uncooked oat groat with an aqueous mixture containing a non-water soluble ingredient to cause adsorption of the ingredient onto at least a portion of the surface of the oat groats as required in claim 35 and all claims dependent therefrom.

Conversely, Tetra Werke only teaches absorbing water-soluble vitamins into a fragmented grain. *See* page 1 of Tetra Werke. "The exposed surfaces of the starch body (endosperm) created in this way cause the latter (fractured grain) to have a particularly large absorbency for the active ingredient solutions." Further, the solution disclosed in Tetra Werke is prepared by dissolving about 500 – 700 g of a vitamin mixture in 5 liters of demineralized water and thereafter blending the solution with the fragmented oats. Thus, Tetra Werke does not even remotely teach or suggest (1) contacting the surface of an uncooked oat groat with an aqueous mixture containing a non-water soluble ingredient and (2) adsorbing an ingredient onto an oat grain. Accordingly, claim 35, and all claims dependent thereon are not obvious and allowable over Tetra Werke.

CONCLUSION

In conclusion, it is respectfully submitted that pending claims 1, 4, 6, 7, 17, 18, 20-30, 32, 33, 35, 36, 38-41, 46, 47, 49-51, 53-55, 57-58 and 60-66 are nonobvious and patentable. An early indication of allowance is solicited.

Respectfully submitted,

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